SUPREME COURT, U. S.
FILED
MAR 28 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 491

BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK, *et al.*,

*Appellants*

v.

I. WILLIAM BIANCHI, JR., *et al.*,

*Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF FOR THE TOWNS OF BABYLON, BROOKHAVEN, ISLIP AND SMITHTOWN, NEW YORK, AS *AMICI CURIAE*

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## BRIEF FOR THE TOWNS OF BABYLON, BROOKHAVEN, ISLIP AND SMITHTOWN, NEW YORK, AS *AMICI CURIAE*

### Interest of the *Amici*

The Towns of Babylon, Brookhaven, Islip and Smithtown are contained in Suffolk County, New York, and the citizens of these towns will be directly affected by the result in this case.

Babylon's 1960 population was 142,309; Brookhaven's was 109,900; Islip's was 172,959, and Smithtown's was 50,347 (R. 19). Under the system of representation declared unconstitutional and enjoined by

the lower court, the citizens of each *amicus* town were afforded one vote on the Suffolk County Board of Supervisors out of a total of ten votes, (R. 4). The four *amici* towns and Appellee Town of Huntington contained in 1960 slightly more than 90% of the county's population but were permitted to exercise only 50% of the voting power on the Board (R. 7). The four *amici* towns and the Town of Huntington are the westernmost towns in Suffolk County and are suburban and commercial in character, while the five intervenor towns are the easternmost towns which remain principally rural in character (R. 126).

Under the voting scheme mandated by State law,[1] the five eastern townships, having approximately 9.95% of the county population exercised in combination the same voting power as did representatives of the five western townships (R. 6-7).

The Supervisors of the Towns of Brookhaven and Huntington filed affidavits in opposition to Appellants' application for a stay pending appeal, in which it was stated that a "stalemate of county government" and a "crippling deadlock" would occur if the former system of "one town—one vote" were reinstated, even temporarily.[2] The four towns filing this brief strongly welcomed the interim relief granted by the lower court

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[1] Laws of New York 1958, c 278, § 203 (Suffolk County Charter); County Law §§ 2, 150 and 153(4) [11 McKinney's Consolidated Laws of New York Annotated, County Law, §§ 2, 150 and 153(4)], and Town Law § 20 (61 McKinney's Consolidated Laws of New York Annotated, Town Law, § 20).

[2] See affidavits of Charles R. Dominy dated July 1, 1966 and John P. Kane dated July 2, 1966, filed July 2, 1966 with the Clerk. Mr. Justice Black denied the stay on July 2, 1966.

on June 15, 1966 (R. 198-199). Their supervisors voted to adopt the permanent plan on Aug. 22, 1966 (Appellants' brief, Appendix B, pp. App. 15-App. 19). They have been the victims of malapportionment at the county level of government and have a vital interest in sustaining the lower court's decision.

## Question Presented

Whether Suffolk County's permanent representation plan, utilizing a system of modified weighted voting, is constitutional.

## Summary of Argument

The four *amici* towns adopt the brief of the Appellees in its entirety and strongly urge the Court to confirm that the Equal Protection Clause of the Fourteenth Amendment requires, in county legislatures, "faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Roman* v. *Sincock*, 377 U.S. 695, 710.

This brief is limited to a discussion of the constitutionality of the permanent representation plan adopted by the Board on August 22, 1966 (Appellants' brief, Appendix B, pp. App. 15-App. 19) and by the voters of Suffolk County on November 8, 1966 (Appellants' brief, Appendix B, pp. App. 21-App. 23).

The *amici* will argue that the modified weighted voting plan so adopted is especially well adapted to the

twin purposes of proportionalizing representation according to population and preserving a voice for the smaller towns. In *Reynolds* v. *Sims*, 377 U.S. 533, the Court held that some deviations from population-based representation in state legislatures could be constitutionally justified as a means of insuring some voice to political subdivisions, as political subdivisions. The modified weighted voting plan adopted in this case grants a voice to such political subdivisions without the necessity of deviating from population-based representation, which is desirable, among other reasons, because it facilitates performance of the public duties which the towns and county, by law, cooperate to perform. The plan is in all relevant respects identical to plans utilizing multi-member districts, which have been approved by the Court. Modified weighted voting makes minority representation possible, being designed specifically for that purpose; and this Court's apparent approval on constitutional grounds of the device of limited voting in a case where deviations from population-based representation were present should *a fortiori* validate a plan where no significant deviations are present. *Matter of Blaikie* v. *Power*, 13 N.Y. 2d 134 (1963), *appeal dismissed for want of a substantial federal question*, 375 U.S. 439; *Blaikie* v. *Wagner*, 258 F. Supp. 364 (S.D.N.Y., 1965).

The *amici* will further argue that weighted voting is an historically recognized device, utilized since 1938 in one county of New York State, and, following the February 1, 1965 decision of the lower court in this case, employed by a number of other counties in the State, either as a temporary or a permanent representation plan.

Although this Court has never ruled upon the constitutionality of weighted voting in a legislative body, it has approved multi-member districting which has nearly identical mathematical characteristics, *Fortson* v. *Dorsey*, 379 U.S. 433; *Burns* v. *Richardson*, 384 U.S. 73, and has also approved weighted voting in labor union conventions, *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171. Although the New York cases are in conflict, the objections to weighted voting, insofar as articulated, would apply equally to multi-member districting plans and are inconsistent with this Court's holdings in *Fortson* v. *Dorsey* and *Burns* v. *Richardson*.

There is no evidence from which the Court could conclude that the permanent plan is unconstitutional. The plan is presumptively constitutional, and Appellants have not even claimed, much less proved, that the plan will cancel out the voting strength of racial or political elements of the voting population; nor will it do so. Appellants' attack upon the plan is simply a challenge to majority rule.

Insofar as the attack upon weighted voting is based upon a claim that representatives of the smaller towns will have a lesser opportunity to influence legislative results, in contrast to the representatives of larger constituencies, it is nonjusticiable. The reapportionment cases do not concern the relative ability of legislators to influence legislative results; they are instead concerned with the preservation of the citizen's franchise, a personal right, *Reynolds* v. *Sims*, 377 U.S. at 561; *United States* v. *Bathgate*, 246 U.S. 220, 227; *compare Skinner* v. *Oklahoma*, 316 U.S. 535.

The *amici* will also argue that the population base of the permanent plan was proper.

## I

**The modified weighted voting plan is especially well adapted to the twin purposes of proportionalizing representation according to population and preserving a voice for the smaller towns.**

### A. Weighted Voting Insures Representation on a Population Basis.

This Court's pronouncements have left no doubt that the Equal Protection Clause requires that state legislative apportionment be effected "on a population basis". *Reynolds* v. *Sims*, 377 U.S. 533, 568; *Roman* v. *Sincock*, 377 U.S. 695, 710. In the election of members of the House of Representatives, the Constitution requires "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's", *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8. The "Constitution's plain objective," said the Court, was to provide "equal representation for equal numbers of people", 376 U.S., 18.

In many of the state cases, representation on a "population basis" has been sought to be accomplished by revising the boundaries of the represented districts, so as to equalize their respective constituency populations as nearly as possible. In some state legislative cases, however, the pre-existing political subdivisions were, for the most part, retained as discrete constituency districts, and equality among the districts was

sought to be accomplished by use of multi-member[3] and floterial[4] districts.

Weighted voting is one way of achieving population equality in legislative apportionment. If single-member districts are used, equalization (more accurately, proportionalization) is achieved by making the districts substantially equal in population and awarding each legislator one vote. If multi-member districts are used, proportionalization is achieved by retaining unequal population districts and awarding extra legislators to the larger districts in proportion to their population. Under weighted voting, proportionalization takes the form of allocating to each legislator a number of votes proportional to the unequal population of the represented districts. If each district has a single legislator to cast the "weighted votes", the form is sometimes referred to as pure weighted voting. If a district's bloc of weighted votes is divided among two or more legislators the form is sometimes referred to as modified weighted voting, New York State Office for Local Government, Reapportionment Information Bulletin, Nos. 5 & 6, November 14, 1966.

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[3] For a discussion of multi-member districts see *Lucas* v. *The Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713, 731; multi-member districts were approved in *Burns* v. *Richardson*, 384 U.S. 73, 88-89; *Kilgarlin* v. *Hill*, 87 S.Ct. 820; and, implicitly, in *Swann* v. *Adams*, 87 S.Ct. 569. The Court specifically suggested the achievement of "some flexibility" in districting by use of multi-member or floterial districts, in *Reynolds* v. *Sims*, 377 U.S. 533, 579. See also *Hughes* v. *Maryland Committee for Fair Representation*, 217 A. 2d 278 (Md., 1966), *cert. den.*, 384 U.S. 950; *Mann* v. *Davis*, 245 F. Supp. 241, 244 (E.D. Va., 1965), *affirmed, Burnette* v. *Davis*, 382 U.S. 42; *Krudenier* v. *McCulloch*, 142 N.W.2d 355 (Iowa, 1966), *cert. den.*, 385 U.S. 851.

[4] For a discussion of the concept of floterial districts, see *Davis* v. *Mann*, 377 U.S. 678, 687.

The modified weighted voting plan adopted by the Board on August 22, 1966 (Appellants' brief, Appendix B, pp. App. 15-App. 19) and approved by the voters on November 8, 1966 (Appellants' brief, Appendix B, pp. App. 21-App. 23) creates, in effect, six single-member districts and four multi-member districts. The distribution of population and legislative votes is shown in the following table:

| Town | 1960 Population (R. 19) | Number of Representatives | Votes |
|---|---|---|---|
| Shelter Island | 1,302 | 1 | 1 |
| East Hampton | 8,827 | 1 | 4 |
| Southold | 13,295 | 1 | 5 |
| Riverhead | 14,519 | 1 | 6 |
| Southampton | 27,095 | 1 | 11 |
| Smithtown | 50,347 | 1 | 20 |
| Brookhaven | 109,900 | 2 | 44 |
| Huntington | 126,221 | 2 | 50 |
| Babylon | 142,309 | 2 | 57 |
| Islip | 172,959 | 2 | 69 |

The modified weighted voting plan approved for Suffolk County, in common with any reapportionment plan containing some multi-member districts, adjusts the legislative strength of each constituency in proportion to its population, the only exception being Shelter Island which is substantially over-represented.[5]

From the standpoint of a citizen's mathematical relationship to the Board, it is immaterial whether

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[5] Shelter Island's 1960 population was 1,302. The permanent plan assigns to all other towns one vote for each 2,500 inhabitants (Appellants' Brief, Appendix B, pp. App. 15-App. 19). The five heavily populated western towns do not challenge Shelter Island's representation, however.

unequal population districts are equalized by the device of awarding additional legislators to the larger districts (multi-member districting) or by the device of awarding proportionalized weighted votes to the legislators from the larger districts.[6] In short, weighted voting, tested by the mathematics of population equality embraced by the Court in *Reynolds* v. *Sims*, 377 U.S. 533, and reiterated in *Swann* v. *Adams*, 87 S. Ct. 569, is the direct equivalent of the device of multi-member districting which this Court has repeatedly held valid as a reapportionment device. *Fortson* v. *Dorsey*, 379 U.S. 433; *Burns* v. *Richardson*, 384 U.S. 73; *Kilgarlin* v. *Hill*, 87 S. Ct. 820; *Swann* v. *Adams*, *supra*.[7]

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[6] For example, the equal status of a citizen of Dade County Florida, in the Florida Legislature, *vis-à-vis* a citizen in St. Lucie County with a population entitling that county to a single seat, could be achieved equally well by allowing a citizen of Dade County to vote either for 22 legislators running at large in the county or for a single legislator entitled to cast 22 weighted votes. (The Florida lower house apportionment plan nullified by this Court on population grounds in *Swann* v. *Adams*, 87 S. Ct. 569, contained multi-member districts ranging up to a 22 man at-large district for Dade County. This 22-man district has been retained in the subsequent judicially ordered reapportionment, *Swann* v. *Adams*, S.D. Fla., No. 186-62-Civil-D.D., February 8, 1967). If the preference had been for modified weighted voting, as in Suffolk County, New York, equal status of the citizen of Dade County could have been achieved by allowing him to vote for two legislators at large, each entitled to cast 11 weighted votes. Dade County's 22 votes could be distributed in a variety of ways: *e.g.*, two legislators having seven votes and one having eight votes; two legislators having five votes and two legislators having six votes. There may be as many variations of weighted voting as there are voting variations in multi-member districting plans.

[7] The differences between multi-member districting and modified weighted voting do not seem to be constitutionally relevant. An "undue" concentration of votes in the hands of one or few legislators should not give rise to any constitutional claims unless it is shown to cancel out the voting strength of racial or political elements of the population. *Fortson* v. *Dorsey*, 379 U.S. 433, 439;

## B. Weighted Voting Permits Recognition of Smaller Political Subdivisions

In *Reynolds* v. *Sims*, 377 U.S. 533, this Court stated:

> "A state may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts." 377 U.S., 578-579.

> "A consideration that appears to be of more sub-

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see also *Burns* v. *Richardson*, 384 U.S. 73, 88-89, and *Kilgarlin* v. *Hill*, 87 S.Ct. 820, 823, n. 3.

Mere concentrations of votes in the hands of a few are analogous to the voting blocs created by at-large elections. The Court has already indicated that the latter, although not necessarily desirable, do not, of themselves, create constitutional difficulties. *Lucas* v. *Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713, 731, n. 21. Modified weighted voting seems preferable to at-large voting in a large multi-member district, because it avoids a long ballot and voter unfamiliarity with the candidates which generally prevails.

In any event, Suffolk County's modified plan fragments the votes of the larger towns. Differences in voting power between legislators, which in mathematical theory are not present in multi-member districting, in practice undoubtedly are manifested by a division of the legislature into community-of-interest blocs: If five legislators from Town A, having a community of interest by reason of their residence, vote together against the one representative of Town B, the effect is the same as if Town A had one legislator casting 5 votes.

> stance [than for example, history or economic or other sorts of group interest, 377 U.S., 580] in justifying some deviations from population representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions . . . in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. . . . But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired." 377 U.S., 580-581.

The device of weighted voting is especially well suited to the purpose of "according some legislative representation to political subdivisions" while faithfully adhering to the population principle. Each constituent unit in Suffolk County's permanent plan is a pre-existing town; yet the weight or "voice" of each town is, by definition, rigidly proportional to its population. Indeed, under the permanent plan, there is almost no deviation from population-based representation except in the case of Shelter Island, which is overweighted in the legislative body.[8]

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[8] Dividing the 1960 population of each town by its total vote on the Board of Supervisors yields remarkably close *per capita* representation figures, with the exception noted in the text. The population per vote of each of the towns under the permanent plan is as follows: Shelter Island 1,312; East Hampton 2,207; Southold 2,659; Riverhead 2,420; Southampton 2,442; Smithtown 2,517; Brookhaven 2,498; Huntington 2,524; Babylon 2,497 and Islip 2,507.

No constitutional provision prohibits adoption of a representation plan which permits political subdivisions to retain their individual identities, and *Reynolds* specifically sanctions such an arrangement, even at the cost of occasioning deviations from population-based representation. 377 U.S., 580-581. Suffolk County's plan achieves the result approved in *Reynolds* without significant deviation, since the legislative "voice" of each political subdivision is weighted in proportion to its population.[9]

Apart from from the avoidance of gerrymandering, 377 U.S., 578-579, recognition of political subdivisions has the advantages of permitting sparsely populated areas spokesmen upon the law-making body, when

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[9] Under Suffolk's proposed permanent weighted voting plan, the average relative population deviation from ideal is 6.95%; if Shelter Island is excluded, the deviation is only 2.25%. Computation of average relative population deviation is accomplished as follows: The ideal population per weighted vote is obtained by dividing the population of the county by the total number of weighted votes, yielding a figure of 2,496. The actual population per weighted vote for each town is obtained by dividing each town's population by its weighted vote. The difference between this figure and 2,496, expressed as a percentage, shows the deviation for each town. Deviation for each of Suffolk's towns as so calculated are as follows: Babylon, 0; Brookhaven, 0; East Hampton, —11.2%; Huntington, +1.1%; Islip, +0.4%; Riverhead, —0.3%; Shelter Island, —47.0; Smithtown, +0.8%; Southampton, —2.2%; Southold, +6.5%. A minus figure indicates that the town has fewer inhabitants per vote than the average and is thus overrepresented. These resulting figures, averaged, show that the average relative population deviation for the plan as a whole is as above stated. See Roeck, *Population Inequality Among Counties in the New Jersey Legislature*, Rutgers University Bureau of Government Research, 1963, p. 10.

In *Swann* v. *Adams* the Court said that population deviations beyond a *de minimus* amount were not unconstitutional *per se* but needed "a satisfactory explanation grounded on acceptable state policy." 87 S. Ct. at 572. The 47% over-representation of Shelter Island affects only .002% of the county's population, and even this over-representation places the handful of people in Shelter Island in no position to enact or block measures against the wishes of the rest of the county.

otherwise they would have none;[10] making the legislature more representative of divergent communities of interest;[11] and facilitating, in the present case, continued cooperation between the towns and Suffolk County in the discharge of public functions.[12]

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[10] If Suffolk's permanent plan were to be replaced by an equal-districting plan, no small town would have the separate representation which is now afforded it. The five easterly towns represent less than 10% of the county population (R. 6), and if ten equal-population districts were created, would in the aggregate be entitled to only one member of the Board. Shelter Island, with 1,302 inhabitants (R. 19), would be totally submerged in such a district, which would by definition have approximately 66,678 residents (R. 19). The chances would be slim that the district's representative would reside in Shelter Island. Under the permanent plan, the five easterly towns may voluntarily combine to cast, in the aggregate, the same proportionate vote on the Board that the posited district delegate would cast; and enjoy, in addition, the right to send five representatives to the county seat, one from each community.

[11] The lower court took notice of the differing character of eastern and western towns, brought about by the population expansion to the east of Long Island from New York City (R. 126).

[12] By State statute, the town supervisor, a combined chief executive officer and legislator at the town level, represents the citizens of his town upon the county Board. (See footnote 1, *supra*, this Brief). The towns and the county cooperate in the maintenance of highways, 24 McKinney's Consolidated Laws of New York Annotated, Highway Law, §§ 102 subdivision (2); 129; 131-b subdivision 2; 135-a and 140 subdivision (18); the administration of welfare programs, 52A McKinney's Consolidated Laws of New York Annotated, Social Welfare Law, §§ 81, subdivision 1(c), (d); subdivision 2(b); subdivision 4; 83, subdivision 4; 88, and 90, subdivision 1(a), (b); the assessment and collection of real property taxes, 49A McKinney's Consolidated Laws of New York Annotated, Real Property Tax Law, §§ 804, 822, 904, 906, 920, 936, 948, 1000 *et seq.*; civil service administration, 9 McKinney's Consolidated Laws of New York Annotated, Civil Service Law, § 17; planning and zoning, 3A McKinney's Consolidated Laws of New York Annotated, Alternative County Government Law, § 552 subdivision 2; 23 McKinney's Consolidated Laws of New York Annotated, General Municipal Law, § 239-b. The County Attorney may be authorized to render legal advice and service to the town boards and town officers when not in conflict with the interests of the county, 11 McKinney's Consolidated Laws of New York Annotated, County Law, § 501, subdivision 4.

## II

**Once population equality in constituency formation is achieved and majority rule clearly assured, some minor modifications, designed to assure minority representation where otherwise there would be none, are permissible under the equal protection clause.**

Matter of *Blaikie* v. *Power,* 13 N. Y. 2d 134 (1963) *appeal dismissed for want of a substantial federal question,* 375 U. S. 439, and *Blaikie* v. *Wagner,* 258 F. Supp. 364 (S.D.N.Y., 1965) are authority for the proposition set forth in the point heading. These cases involved an attack upon New York City's "limited voting" system. The system provided that 27 of the 37 seats on New York City's Council, were to be elected from equal population districts, the remaining 10 to be elected, two at-large from each borough, regardless of its population. No political party could nominate more than one candidate for at-large councilman from any borough, and no elector could vote for more than one candidate for the same office. The two candidates receiving the largest number of votes in each borough are elected. (Chapter 2, Section 22, New York City Charter)

This plan was evolved after a "lengthy and thoughtful study by two successful commissions in order to make possible the election of minority representatives." *Matter of Blaikie* v. *Power,* 13 N. Y. 2d, 139 (1963).

The New York City Council system protected two distinct minority interests: (1) the minority political

party interest which, under the system, was guaranteed at least five seats on the 37 member council; (2) the interests of the residents in the smaller boroughs, [notably Staten Island] which, regardless of population, were each entitled to two at-large councilmen.

This Court's dismissal of the appeal for want of a substantial federal question, 375 U. S. 439, was on motion of the Corporation Counsel of the City of New York, who specifically asserted that the council representation scheme did not violate the "one man-one vote" rule.

The permanent representation plan for Suffolk County is analogous to the New York City Charter provision attacked in *Blaikie,* since it assures at least some voice to the smaller towns which otherwise not only would lose their identity but also be submerged politically and approach zero power under a system of a few, large, single-member districts.[13] If it was

[13] The fact that the minority interest served by the Suffolk plan is a somewhat different minority interest than is served by the New York City plan would seem to be irrelevant conceptually. The purpose and result of the New York City plan was to insure that the dominant political party would not control all 37 City Council seats; under the limited voting provision a minimum of five councilmen—one from each borough—must be a member of a political party other than the dominant party and thus represent and bring into the City Council additional interests and considerations.

However, because the ten at-large councilmen are allocated on a borough basis (two to each borough) rather than on a population basis, an apparent conflict is created between the goal of minority representation and the goal of "equal" voter weight so long as the latter goal is conceived solely in terms of equal population districts. The 1960 populations of the four largest boroughs range from 2,627,313 in Brooklyn to 1,424,551 in the Bronx. The more serious problem is caused by the fifth borough, Staten Island, whose 1960 population was only 221,991.

Although the 2/37ths at-large votes of Staten Island in the

constitutional for New York City to deviate from the population equality principle in order to assure representation to minority, political and regional interests, it is *a fortiori* permissible for Suffolk County to protect the interests of the pre-existing political subdivisions without significantly deviating from popula-

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council (Staten Island also has one district councilman on a population basis) do not materially threaten control of the New York City council by the dominant mass of New York City population, it is obvious that the allocation of two at-large seats to Staten Island is questionable if the only relevant constitutional principle be one requiring every district to approximate the average-size district within a narrow range. However, the price of nullifying the limited voting system on this ground would be a nullification also of the slight degree of minority representation which the limited voting provision does provide. Stated another way, the price would be to give absolute control of the city council to the party or coalition of factions which can muster a voting majority in each borough and in each council district, and to exclude a voice for the minority party or factions in each borough and council district. Clearly there is a conflict of values here between two elements equally relevant to the basic quest for fair representation.

In sustaining the limited voting provision against a "one man-one vote" attack, the district court, 238 F.Supp. 364 (S.D.N.Y., 1965), noted the "winner-take-all" result which may be associated with equal population districts as well as with city-wide elections and concluded that the limited voting provision was designed—and by judicial notice did operate—to achieve a rational purpose of providing minority representation and spokesmen in the machinery of local government without at the same time endangering effective majority rule. The court said:

> "Were there to be a city-wide election for Council members, there would exist a real danger of an absolute monopoly by a single party. The equal districting reduces this possibility but only to a minor extent." 238 F. Supp. 368.
>
> "The present system was deliberately designed to afford at least the possibility of representation to a large segment of the population and to enable them through party representation to obtain it." 258 F. Supp. 370.

Hence, the over-representation of Staten Island was deemed to be a *de minimus* by-product of a paramount purpose of providing minority party representation in each borough throughout the city.

tion-based representation. The New York Court of Appeals described the New York City Charter provision as the State's "latest experiment in limited voting, approved by its inhabitants [and] one which the Constitution permits it to make." 13 N. Y. 2d, 144. Suffolk County's latest experiment, which ensures minority representation, is also a Constitutionally permissible one.

## III

**Weighted voting is historically recognized, has actually been utilized in a county legislature in New York State for many years, and enjoys some degree of judicial approval.**

Although weighted voting has not often been utilized in American legislative bodies, its merits were discussed as long ago as the 1840's, when it was considered for use in the Kentucky legislature. Thorpe, *A Constitutional History of the American People 1776-1880,* Vol. II, pp. 107-109 (1898).[14]

In June, 1964, a federal district court ordered weighted voting as a temporary remedy for the Washington State legislature unless reapportionment by a

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[14] The following virtues, still pertinent, were suggested for weighted voting: (1) it would preserve separate and independent representation for each unit; (2) it would minimize gerrymandering; (3) it would prevent creation of communities of disinterest which occurs when sections of different sentiment are placed together solely for mathematical quota purposes; (4) it would give every citizen a better voice in the councils of state; (5) by preserving separate representation for each county, jealousy and ill-will between counties would be minimized. Thorpe, *A Constitutional History of the American People 1776-1880* Vol. II, pp. 107-109 (1898). The system was not adopted on policy grounds.

special session intervened. *Thigpen* v. *Meyers,* 231 F. Supp. 938 (W.D. Wash., 1964)[15]

A New Mexico state court upheld a weighted voting plan against federal Constitutional attack, but invalidated it on state constitutional grounds, *Cargo* v. *Campbell,* Santa Fe County District Court, Civ. No. 33272 (January 8, 1964).[16]

In New York a fractional voting provision was included in two of three state reapportionment plans nullified by a federal district court, but the court expressly reserved judgment on possible use of fractional or weighted voting for local government reapportionment. *WMCA* v. *Lomenzo,* 238 F. Supp. 916, 924 (S.D.N.Y., 1965).[17] One member of the three-judge panel subsequently indicated a preference for weighted

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[15] The court held that weighted voting satisfies the constitutional test of "one man-one vote". 231 F. Supp. at 941. The court's order was subsequently withdrawn in favor of a new order prohibiting the legislature from adopting other than housekeeping measures pending reapportionment (unreported order, Oct. 5, 1964, Civil File #5597).

[16] Other courts have disapproved weighted voting on state grounds. *Asbury Park Press, Inc.* v. *Woolley,* 33 N.J. 1, 161 A. 2d 705 (1960); *Brown* v. *State Election Board,* 369 P. 2d 140, 148-149 (Okla., 1962); *League of Nebraska Municipalities* v. *Marsh,* 209 F. Supp. 189 (D. Neb., 1962).

[17] Fractional and weighted voting systems are similar. In weighted voting the smallest unit receives one vote; in fractional voting the largest unit receives as many legislators, each having one vote, as its population warrants, and the units whose population is less than the apportionment quota are allocated one legislator who casts a fractional vote proportionate to his unit's population. In weighted voting systems the larger population units generally have fewer representatives than votes. The court in *WMCA* (the only federal court to do so), evidently refused to accept fractional voting for the New York Legislature in part because of the difficulty of adapting a fractional system to the operation of committees, which are a vital part of the law-making process at the State level. Another factor was the exaggeration of the influence of the

voting as an interim measure, but it was neither enacted nor ordered. *WMCA* v. *Lomenzo*, 246 F. Supp. 953, 956-960 (S.D.N.Y., 1965).

At an early stage of the Alabama reapportionment litigation, a memorandum on weighted voting as a possible judicial remedy for malapportionment was submitted by Professor C. Dallas Sands at the request of Judge Richard T. Rives. (See Memorandum Brief filed in *Sims* v. *Frinck*, Civ. No. 1744-N, July 5, 1962). The memorandum concluded:

> "The practice of allowing thinly populated areas to have delegates who could act as their spokesmen in order to assure that their interests be not overlooked can be defended without sacrifice of democratic principle if the weight of a delegate's vote in legislative decision making is not out of proportion to the population of the area he represents. The technique for reform that has been

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representative casting a fractional vote, with respect to his "errand boy" or "lobbyist" services for his constituents: the smaller subdivisions might only be entitled to a fractional vote, but they received the services of a whole "lobbyist". *WMCA* v. *Lomenzo*, 238 F. Supp. 923. (This argument runs directly *contra* to Banzhaf, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 Rutgers L. Rev. 317 [1965], who views the small constituency as under represented.)

These factors are inapplicable to local legislative bodies which customarily operate as a committee of the whole, and which perform a minimum of "lobbyist" functions. (The New York Supreme Court, Westchester County, in *Town of Greenburgh* v. *Board of Supervisors of Westchester County*, February 9, 1967, Appendix A, this Brief, rejected an attack premised upon the applicability of weighted voting to committee situations).

Moreover, because there are important differences among local legislatures themselves in regard to: formal structure, manner of operation and the magnitude of legislative business, the considerations which might lead to invalidation of a fractional or weighted voting plan in one locality might not be present in another. Local legislatures vary more *inter se* than do state legislatures.

suggested here would make it possible to give all regions a voice in debate without sacrificing equal rights of citizens to participate in the power of decision. This technique could not have been employed in earlier times because of the sheer burden of the arithmetical work that it would then have entailed. That is no longer a problem, however, with modern tabulating machines and computing equipment."

On July 15, 1962, a conference of political scientists, law professors, journalists and others, assembled by the Twentieth Century Fund to consider means of implementing the Court's decision in *Baker* v. *Carr*, 369 U. S. 186, invited attention to the device of weighted voting. "One Man—One Vote", Twentieth Century Fund, 1962 (pamphlet)

Nassau County, New York has utilized a system of weighted voting since 1938 "without serious difficulties" Weinstein, *The Effect of The Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Columbia L. Rev. 21, 44 (1965).[18]

[18] The author, Jack B. Weinstein, at the time the County Attorney of Nassau County (and presently a federal district judge nominee) stated, with respect to the Nassau County Charter (N. Y. Sess. Laws, 1936, c. 879, as amended N. Y. Sess. Laws, 1937, c. 618) that "Election of a county executive, weighted voting, a county-wide police force and county-wide assessments used by the towns and most of the villages constituted a series of remarkable achievements for its time, and still provide a model for other counties of the state. 65 Columbia L. Rev., 44, n. 95 (1965). He treated the issue of constitutionality as follows: "Weighted voting does provide some of the advantages of local representation while insuring a measure of equality. It seems likely that weighted voting will be held to comply with federal constitutional requirements when it is 1) adopted in good faith, 2) to meet special situations, and 3) the discrepancies in voting power are not extreme." 65 Columbia L. Rev., 41 (1965).

On July 7, 1966 the New York Court of Appeals rendered a cryptic decision in *Graham* v. *Board of Supervisors of Erie County,* 18 N. Y. 2d 672 (1966) in which that court stated that weighted voting had "inherent defects". In a short decision, the court approved a weighted voting plan for Erie County, "but solely as a temporary expedient".

Prior to *Graham* some lower courts had approved weighted voting, (*e.g. Shilbury* v. *Board of Supervisors of the County of Sullivan,* 46 Misc. 2d 837, 260 N. Y. S. 2d 931 (1965), *affirmed,* 25 A. D. 2d 688, 267 N. Y. S. 2d 1022 (1966) [temporary plan]; *Dona* v. *Board of Supervisors of County of St. Lawrence,* 48 Misc. 2d 876, 266 N. Y. S. 2d 229 (1966) [as either a temporary or permanent plan]; *Seaman* v. *Fedourich,* 47 Misc. 2d 26, 262 N. Y. S. 2d 591 (1965) [temporary plan]).

After the *Graham* decision in the Court of Appeals, New York's lower courts split, with some courts apparently deeming themselves bound by that court's statement in *Graham* [*e.g. Morris* v. *Board of Supervisors of Herkimer County,* 50 Misc. 2d 929, 273 N. Y. S. 2d 453 (1966); *Iannucci* v. *Board of Supervisors of County of Washington,* (Sup. Ct., Washington Co., August 9, 1966, Sweeney, *J.*; *The Saratogian, Inc.* v. *Board of Supervisors of the County of Saratoga,* (Sup. Ct., Saratoga Co., August 16, 1966, Sweeney, *J.*)].

The Supreme Court, Westchester County, however, in a comprehensive post-trial decision (*Town of Greenburgh* v. *Board of Supervisors of Westchester County, et al.,* [Supreme Court, Westchester County,

Index No. 6859—1965, Opinion of Nolan, *J.* filed February 9, 1967] ruled weighted voting constitutional as a permanent plan.[19]

In *Town of Greenburgh,* the Court said:

> "Plans which provide for reapportionment of county legislative bodies will necessarily deal with varying conditions in different counties. Each should be judged in the light of its own provisions as they deal with local conditions, and as they affect the citizen's right to fair and effective representation in the legislative body. What may be impermissible with respect to state legislative reapportionment plans may be permissible in county plans, and what may be permissible in one county may be unacceptable in another. (cf. *Reynolds* v. *Sims,* supra, 377 U. S. 533, 578, *Swann* v. *Adams,* supra). . . . The towns and the cities are political subdivisions of the County, and large or small, each has its problems which it does not share with neighboring towns, or cities, and in which its neighbors may have no interest whatsoever." (February 9, 1967 opinion, p. 20).

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[19] Pertinent excerpts from the decision, which has not as yet been printed in full, are set forth in Appendix A to this Brief. The decision was reached after a trial at which the principal challenger of weighted voting and multi-member districting testified. Banzhaf, *Weighted Voting Doesn't Work: A Mathematical Analysis,* 19 Rutgers L. Rev. 317 (1965); Banzhaf, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle,* 75 Yale L. J. 1309 (1966). Mr. Banzhaf challenges both systems of representation on the same grounds, and apparently disapproves this Court's ruling in *Fortson* v. *Dorsey,* 379 U. S. 433, and *Burns* v. *Richardson,* 384 U. S. 73.

(In *The Town of Greenburgh* case the plan was actually invalidated because of a differing population base for the City of Yonkers and the remainder of the county).

Even if there were a consistent line of decisions in the New York courts holding weighted voting to be federally unconstitutional under a misapplication of *Reynolds* v. *Sims*, 377 U. S. 533, it would still be open to this Court to correct undue limitations on legislative discretion resulting from lower courts' misreadings of federal constitutional law.

However, the absence of a consistent line of New York decisions since *Graham* is highlighted by the fact that 13 of New York's 62 counties are presently operating under a temporary or permanent weighted voting plan. New York State Office for Local Government, Information Bulletins Nos. 5 and 6, November 14, 1966.[20]

This recent activity on the part of New York's local governing bodies is consistent with America's tradition as "the world's foremost laboratory for experiments in new forms of municipal government." 1 Munro, *Municipal Government and Administration* (1925) p. 397.

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[20] The modified weighted voting plan adopted in this case was first suggested by a citizen's reapportionment committee appointed by the chairman of the board of supervisors following the lower court's February 1, 1965 decision.

## IV

**Weighted voting cannot be challenged and nullified under recently developed higher mathematical approaches toward reapportionment without at the same time nullifying substantially all multi-member districting to which this newer mathematical concept applies with equal force.**

The conventional approach to reapportionment mathematics has been to think in terms of total population and to assess actual apportionment plans in terms of the degree to which the plan achieves a *constituency equalization on a population basis.* This approach rests on the assumption that if legislative election districts be thus equalized (or proportionalized in the case of multi-member districting and weighted voting), the voters will have equal voting weight at least at the constituency level.

The theme of *Wesberry* v. *Sanders,* 376 U.S. 1 and of *Reynolds* v. *Sims,* 377 U.S. 533 and the line of cases derived therefrom, is constituency equalization as the means of effectuating a "one man-one vote" principle. Accordingly this Court has frequently sought guidance in such mathematical measures of linear population proportionality as the following: (1) the population variance ratio, *i.e.,* the ratio between the largest and the smallest district for a given legislative house; (2) the number of districts which deviate in population from the average-sized district by more than some specified percentage such

as 10 or 15 percent; (3) the fictional electoral percentage, *i.e.*, the least percentage of the population—ignoring the realities of voting and the actual political division of all constituencies—which theoretically could elect a majority of the legislature.

Under all these measures, or extrapolations therefrom, weighted voting is clearly constitutional because it achieves almost an exact constituency proportionalization on a population basis. Of course, if weighted voting be used as the equalization device for a very small legislature chosen from constituencies of varying population, there may be in certain assumed circumstances some *legislators* who have little voting power in terms of power to stop legislative action. See Banzhaf, *Weighted Voting Doesn't Work: A Mathematical Analysis,* 19 Rutgers Law Review 317 (1965). Despite the negative cast of Mr. Banzhaf's title, an analysis of this article and his subsequent article [*Multi-member Electoral Districts—Do They Violate the "One Man-One Vote" Principle,* 75 Yale L. J. 1309 (1966)] quickly reveals that his message is *not* that either weighted voting or multi-member districting are constitutionally suspect under presently articulated mathematical standards of this Court. Rather, assuming a significant shift in Court emphasis to achieve a rigid, theoretical equalization of ultimate citizen influence in reference to legislative outcomes, Banzhaf demonstrates that interesting disparities do exist in some present systems judicially approved. Yet, in many actual legislatures there are sizeable consistent minorities of legislators who never have power to block majority action in terms of brute power alone, but who do nevertheless provide a *voice*

for minority interests and have open to them such techniques as persuasion and publicity.[21]

Some commentators have developed an analytical process which they claim shows that the citizens of the more populous districts have an inherent mathematical advantage, under either a weighted voting or multi-member districting plan. Banzhaf, *Weighted Voting Doesn't Work—A Mathematical Analysis,* 19 Rutgers Law Review 317 (1965); Banzhaf, *Multi-Member Electoral Districts—Do They Violate the "One Man-One Vote" Principle,* 75 Yale Law Journal 1309 (1966); Shapley and Riker, *Weighted Voting: A Mathematical Analysis for Instrumental Judgments,* [paper presented at December, 1965 annual meeting of the American Society for Political and Legal Philosophy (mimeograph)].

The theory of Banzhaf and others is that a citizen's influence upon legislative outcomes decreases as the population of his unit increases, but that his influence decreases more slowly than the population increases. Thus, it is said, a linear adjustment of a larger constituency's voting power in the legislative body so as to be proportional to its population necessarily overcompensates for the loss of citizen influence, thereby

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[21] Any argument that the plan is unconstitutional because Shelter Island's representative rarely casts a *decisive* ballot is fallacious. It assumes that Shelter Island's citizens would be better represented by being submerged in a large population district where Shelter Island's residents would form a tiny fraction of the total population of the district, and the chances are small that the representative of the district would ever be a Shelter Island resident.

Shelter Island's 1,302 citizens, in short, are entitled to no greater political power than any other 1,302 citizens of the county selected at random.

working an overrepresentation in favor of the citizens of the larger constituencies.

The Court approved multi-member representation plans in *Fortson* and *Burns,* although the higher mathematics procedures advocated by Banzhaf could have been utilized to invalidate such plans. Recently in *Kilgarin* v. *Hill,* 87 S. Ct. 820, the Court remanded for modification of the Texas State reapportionment plan for a determination whether "seeming[ly] underrepresent[ed]" Dallas and Bexar Counties could be afforded additional representation under relevant State law.[22]

Although the higher mathematics approach is provocative, the necessary assumption upon which its relevance rests in constitutional litigation is that the one man–one vote principle means more than constituency equalization on a population basis. The Court has not yet concerned itself Constitutionally with the question as to the relative effectiveness or influence of varying groups of citizens in the legislative process.[23]

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[22] The Court was aware of suggestions that heavily populated districts "are adequately, if not over, represented." 87 S. Ct., 823, n.3.

[23] For example, the seniority system almost universally adopted by legislative bodies in America insures that control will remain in the hands of those areas where population and political complexion remain relatively stable as, for example, in one-party areas. As noted by Justice Nolan in *Town of Greenburgh* v. *Board of Supervisors* (New York Supreme Court, Westchester County, Index # 6859—1965, opinion filed February 9, 1967, excerpts set forth as Appendix A to this Brief, see particularly p. App. 18), not all legislators serve on all committees or on equally important committees. Other factors operating within a legislative body are equally difficult to measure against Constitutional standards, for example: Geographical concentration or dispersion of party strength or interest

## V

**Once apportionment allocating representatives on a basis proportional to the population of the district has been achieved under *Reynolds*, the equal protection clause has been satisfied; such further matters as the political operation of the plan, whether tested by higher mathematics or practically by analysis of actual legislative votes, raise non-justiciable political considerations under the Guaranty Clause.**

The Court's rulings since *Reynolds* have raised questions under the Equal Protection Clause under which judicial standards are "well developed and familiar". *Baker* v. *Carr*, 369 U.S. 186, 226. The right protected under *Reynolds* is a personal one. *Reynolds* v. *Sims*, 377 U.S. at 561; *United States* v. *Bathgate*, 246 U.S. 220, 227. It is the "equality" of vote at the citizen level which is protected.[24]

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group strength, as bearing upon the prospect of electing any spokesman; "winner take all" results of at-large voting [which this Court indicated in *Fortson* a willingness to examine if, in a particular case, a scheme operates "to minimize or cancel out the voting strength of racial or political elements of the voting population"]; extraordinary majority voting requirements inside legislatures for enactment of certain measures; rules for discharging measures from committees; rules for terminating a filibuster and bringing a measure to a vote. The Court has never viewed such chance factors operating within a legislative body as being subject to constitutional attack because they may arbitrarily exaggerate or diminish the influence of various groups upon legislative outcomes.

[24] In *Kilgarlin* v. *Hill*, 87 S. Ct., 821 and *Swann* v. *Adams*, 87 S. Ct. 569 the Court concerned itself with the degree of variance from the "equality principles." In *Fortson* v. *Dorsey*, 379 U.S. 433, the Court left open the possibility of constitutional attack upon a multi-membership scheme upon a showing that in a particular case, it "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." The concurring opinion of Mr. Justice Douglas in *Kilgarlin* reserved the question as to whether a multi-member district might be "con-

The difficulty of analyzing by constitutional standards the various factors which operate to exaggerate or diminish the effectiveness of various representatives is discussed in *Town of Greenburgh* v. *Board of Supervisors* (Supreme Court, Westchester County, February 9, 1966 opinion, Appendix A, this Brief, pp. App. 11, to App. 15; App. 18 to App. 19; see also n.23 *supra*, this Brief). There is no claim made that Suffolk County's permanent plan deprives any racial or other minority of its proportionate representation upon the board of supervisors.[25] Any exaggeration of the voting strength of some towns or diminishment of the voting strength of others results simply from the mathematical relation between the population of the town examined and all other towns represented in the same body. No "discrimination" is either claimed or provable.[26]

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structed in such a manner that Negroes are effectively disinfranchised". 87 S. Ct., 824. And in *Burns* v. *Richardson*, 384 U.S. 73, 88 the Court theorized that an invidious result might more easily be shown if "in contrast to the facts in *Fortson*, districts are large in relation to the total number of legislators [or] not appropriately subdistricted to assure distribution of legislators that are resident over the entire district."

[25] It might be conceived, for example, that a town with a 25% Negro population concentrated in a contiguous area and entitled to four votes on the board of supervisors might provide for election of all four representatives at large within the town so as to deprive the Negro community of its fair representation. Such a result might, we assume, be unconstitutional.

[26] The Court in *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171, upheld weighted voting in union conventions as a fair and proper method of rerpresentation. In that case the Court of Appeals, 326 F.2d 26, 29 (C.A. 2, 1963), had held that "the weighted voting method is to all appearances the most 'democratic' method, in the sense that each member is duly 'represented,' and it is a method of voting widely recognized as fair and proper by a number of unions." The brief of the United States as *amicus curiae* filed in that case stated, p. 13:

> "There is not a word in the legislative history which even remotely suggests that any person considered that weighted voting at conventions was an evil."

In the absence of an experience record,[27] no one can say, based upon mathematical formulae, whether Suffolk County's permanent plan will result in invidious discrimination to the residents of any area. Without either actual or predictable data, any judgment as to the allegedly invidious effect of the permanent plan not only rests upon speculation, but also necessarily involves the weighing of factors which are not susceptible to the application of judicially manageable standards. Any such questions, therefore, are nonjusticiable political questions. *Baker* v. *Carr,* 369 U.S. 186, 217.

## VI

**If weighted voting be attacked on operational grounds rather than on mathematical grounds, it then comes under the rules of *Fortson* v. *Dorsey* and *Burns* v. *Richardson* and is entitled to a similar presumption of constitutionality with the burden of proof being imposed upon the challengers to show how in practice an invidious discrimination results.**

The Court in *Burns* v. *Richardson,* 384 U. S. 73, 88-89, specifically held that the legislature's discretion on apportionment policy is subject to Constitutional challenge only when the challengers can show, and not merely allege, that the apportionment plan is defective.[28]

The appellants have not borne that burden in this case.

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[27] Suffolk's permanent plan is not due to go into effect until January 1, 1968 (Appellant's Brief, Appendix B, App. 18).

[28] The Court said, "[t]he demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record. . . . Speculations do not supply evidence that the multi-member districting was designed to have or had the invidious effect necessary to a judgment of the unconstitutionality of the districting." 384 U.S., 88-89.

## VII

**The population base utilized by Suffolk's permanent plan was proper.**

Appellants challenge the propriety of Suffolk County's permanent representation plan, on the theory that great population dislocations result at the local governmental level by reason of the presence within a township of large numbers of people who, under some natural law concept, appellants believe should not be represented. They specifically refer to, and complain of, the presence within Suffolk County of a large military base and several large state mental hospitals. In *Davis* v. *Mann*, 377 U.S. 678 at 691 this Court stated:

> "We reject appellants' argument that the underrepresentation of Arlington, Fairfax and Norfolk is constitutionally justifiable since it allegedly resulted in part from the fact that those areas contain large numbers of military and military related personnel. Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible."

With respect to the state mental hospitals, the New York Court of Appeals has ruled in *Seaman* v. *Fedourich*, 16 N. Y. 2d 94, at 103-104, 105 (1965) that no sound reason had been suggested for denying mental patients legislative representation, since under state law, many had been voluntarily admitted to the area hospital and, not having been judicially declared incompetent, are actually entitled to vote.

## CONCLUSION

**The order of June 15, 1966 appealed from should be in all respects affirmed; if the Court reaches the question, the permanent plan should be upheld as constitutional.**

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## APPENDIX A

**Excerpts from Opinion Filed February 9, 1967 in Town of Greenburgh, et al., v. The Board of Supervisors of Westchester County, et al. (New York Supreme Court, Westchester County, Nolan, *J.*)**

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* * * The court is now required to determine whether the local law meets constitutional requirements for full and effective citizen participation in the political processes of the County's legislative body. (cf. *Gray* v. *Sanders*, 372 U. S. 368, *Reynolds* v. *Sims*, 377 U.S. 533, *Seaman* v. *Fedourich*, 16 N.Y. 2d 94).

The local law adds nine additional legislators to the Board, increasing the number from 45 to 54, and distributes legislative seats and voting power according to a "modified weighted voting" plan, which retains the towns and cities of the county, as the districts from which the legislators are to be elected, and purports to equalize the voting power of the legislators by providing multiple votes for all legislators and additional legislators for the larger towns, so that the vote of the legislator or legislators from each district is substantially proportional to the population of the district which he or they represent. A detailed analysis of the plan, insofar as it involves

the distribution of the legislatve seats, and the vote in the Board is shown in the following table:

| Town | Population 1965 Census | No. of Supervisors | Votes per Supervisor | Total Votes | Per Capita Representation |
|---|---|---|---|---|---|
| Bedford | 15,867 | 1 | 16 | 16 | 992 |
| Cortlandt | 31,340 | 2 | 16 | 32 | 980 |
| Eastchester | 34,129 | 2 | 17 | 34 | 1004 |
| Greenburgh | 82,882 | 4 | 21 | 84 | 987 |
| Harrison | 20,433 | 1 | 20 | 20 | 1022 |
| Lewisboro | 5,123 | 1 | 5 | 5 | 1025 |
| Mamaroneck | 30,745 | 2 | 15 | 30 | 1025 |
| Mt. Pleasant | 37,220 | 2 | 19 | 38 | 980 |
| New Castle | 16,351 | 1 | 16 | 16 | 1022 |
| North Castle | 7,738 | 1 | 8 | 8 | 967 |
| North Salem | 2,924 | 1 | 3 | 3 | 975 |
| Ossining | 31,455 | 2 | 16 | 32 | 983 |
| Pelham | 13,666 | 1 | 14 | 14 | 976 |
| Pound Ridge | 2,962 | 1 | 3 | 3 | 987 |
| Rye | 39,846 | 2 | 20 | 40 | 996 |
| Scarsdale | 18,345 | 1 | 18 | 18 | 1019 |
| Somers | 6,655 | 1 | 7 | 7 | 951 |
| Yorktown | 22,044 | 1 | 22 | 22 | 1022 |
| Total Towns | 419,725 | 27 | | 422 | Mean–995 |
| City | | | | | |
| Mount Vernon | 72,918 | 5 | 15 | 75 | 972 |
| New Rochelle | 75,206 | 4 | 19 | 76 | 990 |
| Peekskill | 18,504 | 2 | 9 | 18 | 1028 |
| Rye | 15,232 | 1 | 15 | 15 | 1015 |
| White Plains | 50,040 | 3 | 17 | 51 | 981 |
| Yonkers | 201,573 | 12 | 17 | 204 | 988 |
| Total Cities | 433,473 | 27 | | 439 | Mean–987 |
| Grand Total | 853,198 | 54 | | 861 | Mean–991 |

According to the plan, if approved, there will be 11 towns which will be single member districts, (districts with a single representative) and 7 towns which will be multimember districts (districts in which two or more representatives will be elected at large). Additional representatives have been allotted in the

multimember districts substantially on the basis of one for each additional 18,000 or major fraction thereof, in population. Votes have been assigned to each legislator on the basis of one for each 1000 in population, and each remaining major fraction of 1000. In the cities there will be one single member district, three multimember districts, and two districts, Yonkers and New Rochelle, in each of which representatives will be elected from wards, in accordance with City Charters. The number of representatives from the cities could not be changed consistently with relevant statutes, since the charter of each city had provided the number of supervisors to be elected, as city officers. In the cities which were to constitute multiple member districts, therefore, votes were apportioned among the supervisors on the basis of one for each 1000 of population by dividing the population in each case by the number of supervisors, and assigning votes according to the quotient so obtained. In the Cities of New Rochelle and Yonkers, although the supervisors will not be elected at large, and the wards of the Cities will constitute the districts from which they will be elected, the same procedure was followed and these two cities have been treated as multimember districts. The population figures which were used as the basis of the apportionment were taken from the 1965 special population census of Westchester County, which does not disclose the populations of the wards in either City, and apparently it was assumed in the absence of evidence to the contrary that the wards were of substantially equal populations. Under the local law, if this distribution of legislative seats and voting power may be sustained, the result will be that the mean popula-

tion represented by each vote in the board will be 991. The largest constituency represented by a single vote (Peekskill) will be 1028, and the smallest (Somers) will be 951. The population variance between the largest and smallest constituencies will be 1.08 to 1., and the maximum variance from the mean will be 1.04 to 1. The votes of at least 49.9% of the population of the County will be required to elect a voting majority in the board. A numerical majority of the legislators (28) may be elected by the vote of the residents of towns and cities which have a combined population equal to 43.59% of the total population of the County. The legislators so elected, however, will be able to cast a vote which will represent only 43.67% of the total vote of the board. The law further provides for reapportionment after each decennial or special census, and is to take effect January 1, 1968. The additional legislators are to be elected at the general election of 1967, and the local law is to be submitted for approval at a special election to be held April 18, 1967.

* * * *

Before discussion of the constitutional questions, however, it should be stated that they are the only questions which may be considered. Unquestionably the administration of the local law will involve complications which would not be encountered if the law had provided for representation on the board by legislators elected from districts of equal population. Unquestionably, also if the Board of Supervisors had decided to adopt such a plan, providing for properly constructed districts, and equal representation therefrom, the constitutional objections to the present law would have been avoided. Perhaps other plans could

be adopted which might appear to be more desirable from the viewpoint of some residents of the county, and perhaps there is no longer any need, nor is it desirable to retain the towns and cities as the districts from which legislators should be elected to the County Board. However, questions of wisdom, desirability, need or appropriateness are for the legislative branch of the government, and not for the courts to determine. The sole function of this court, at least at present, is to determine whether the local law fails to meet constitutional requirements for population based representation, on the County Board of Supervisors. "Representative government, is in essence, self government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." (*Reynolds* v. *Sims,* supra, 377 U. S. 533, 565). Each citizen has, of course, the same right with respect to the processes of his County Board of Supervisors (*Seaman* v. *Fedourich,* 16 N.Y. 2d 94). That right will be denied him, unless he can exercise through his elected representative, an influence on legislative determinations equal to that of any other resident of the county.

It is contended that the citizens of Westchester County, and in particular those who reside in the smaller electoral districts will be deprived of proper representation and of equal legislative influence through the combination of weighted voting and multiple representation employed in the local law. Whether they will, or will not suffer such deprivation depends on the answers to questions which the relevant case law has so far left unanswered. The litigation

which resulted in the promulgation of the "one person, one vote" rule by the Supreme Court of the United States was concerned with the correction of inequities in representation as between districts (see *Reynolds* v. *Sims*, supra, 377 U. S. 533 and companion cases), or as Mr. Justice Douglas put it in *Baker* v. *Carr* (369 U.S. 186, 244) the question was "may a state weight the vote of one county or one district more heavily than another." However, it is not entirely clear, since the cases in which the determinations were made involved the apportionment of legislative seats and did not involve questions similar to those presented here which involve the allocation of voting power, whether the "one person, one vote" principle requires the equalizing of voting power at the citizen level by nothing less than the creation of districts of equal population, to be represented by the same number of legislators, with equal votes, or may be complied with by giving each legislator, as the representative of the citizens in his electoral district effective legislative influence proportional to the population of the district or fraction thereof which he represents, even though the districts may be of substantially unequal populations. If the latter practice will comply with constitutional requirements, there does not appear to be any method by which it can be accomplished, in the instant case, except by the employment of weighted voting, multimember districts, or a combination of both, and the question then arises whether the citizen's right to fair and effective participation in legislative processes includes the right to population based representation on legislative committees, or in other legislative activities (cf. *Y.M.C.A.* v. *Lomenzo*, 238 Fed. Supp. 916). None of these questions have been answered with

finality, at least with respect to legislative apportionment at the county level, although there may be some indication that plans involving multimember districts will be acceptable at the state level if the population bases per representative are substantially equal. (See *Swann* v. *Adams,* U. S. Supreme Court, January 9, 1967). Certain fundamental rules appear to be clear, however. Although some deviations from population based representation may be permitted for the purpose of insuring some voice to political subdivisions, as political subdivisions, and a legislative body may legitimately desire to construct districts along political subdivision lines, population may not be submerged as the controlling consideration in the apportionment of legislative seats or voting power (*Reynolds* v. *Sims,* supra, 377 U. S. 533, 581). It appears to be equally clear that when a rational plan for legislative apportionment has been submitted (cf. *Swann* v. *Adams,* supra U. S. Supreme Court January 9, 1967) those who assert that it is unconstitutional have a heavy burden to sustain. Courts strike down statutes as unconstitutional only as a last resort. It is not sufficient that those who attack them may succeed in establishing that there is some doubt as to their validity. Unconstitutionality must be demonstrated beyond a reasonable doubt. (cf. *Wiggins* v. *Town of Somers,* 4 N.Y. 2d 215, 218, 219 and cases cited).

Whether population has been submerged in the plan presented by the local law, as the controlling consideration, may be farily debatable. One of the dominant purposes of the plan is to continue to give separate representation in the board to the residents of each town, and each city in the County by retaining the town and city supervisors as members of the board

with the result that inconsistencies appear in the apportionment of legislative seats which would not be present if a plan had been adopted providing for equal representation from districts of equal population. Although additional legislators are assigned to the larger towns, roughly on the basis of one for each 18,000 residents, a single legislator is assigned to each of the small towns with population ranges of from 13,666 to 2,924. In the cities, New Rochelle, with a greater population than Mt. Vernon, has 4 legislators, to 5 for Mount Vernon, and Peekskill, with 18,504 residents, has 2 legislators. Nevertheless the legislators with the smaller constituencies have less votes in the board, and the assignment of votes, or voting power, is strictly proportional to populations. Such being the case if the assignment of legislative seats and voting power may be sustained it does not appear that population has been unduly submerged as a controlling circumstance, within the meaning of the requirements of the "one person, one vote rule." * * *

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This discussion might well end here if it were not for the fact that the opponents of the local law have advanced additional arguments with respect to the employment of weighted voting, and multimember representation as a permanent remedy for legislative malapportionment. Although determination of the issues so raised may not be necessary, some discussion of them may be helpf l in facilitating appellate review.

It must be conceded that plans involving weighted voting, and multimember electoral districts are not constitutionally acceptable if they do not do at least what they purport to do, that is, if they do not allocate

effective voting power to legislators in proportion to the population that each represents. It is asserted that they do not, and that such plans inevitably result in discrimination, and are inherently unconstitutional devices for curing malapportionment in legislative bodies.

Both devices have features in common, and are similar in theory in that both are employed as corrective measures to remedy disparities in voting power in districts of unequal population. For instance, in a hypothetical case involving four districts, A, B, C & D, each represented by a single legislator with a single vote, if each of districts A, B, & C has a population of 400, and D has a population of 2500, it is apparent that the vote of a resident of District A, B, or C has a greater weight than the vote of a resident of District D. In District D, obviously, the citizens, each of whom has a vote of 1/2500 of the total vote of his district, must vote a greater number of times than the citizen in District A, B, or C, before the effect of their voting is equivalent. The effect of the overweighting of the votes of the citizens of the smaller districts, in terms of legislative representation, is apparent, since the residents of districts A, B, & C can elect three representatives who can outvote the single representative from District D, even though he represents 2500 constituents, and they represent only 1200. Although the cited case is hypothetical, a comparable situation existed in the Board of Supervisors when this action was commenced and in the State legislatures involved in the litigation which resulted in the establishment of the "one person, one vote" principle, in the 1964 decisions of the Supreme Court of the United States. The corrective measure applied to correct this inequity at

the legislative level under a weighted voting system, is ordinarily, to give the representative from District D a greater number of votes proportionate to the population which he represents, and under a multimember voting plan, to give district D additional representatives in proportion to the population of the district. This might be done in such a case by giving District D, 6 votes or 6 legislators. There is a third method, "modified weighted voting" which is employed in the local law, which involves adding additional representatives, and additional votes, to effect population based representation. Under this method District D might be given 3 representatives, with 2 votes apiece. Obviously, under the stated conditions, with respect to these four districts, and under many others which can be readily hypothesized, weighted voting will not effect a cure. Although the voter in district D is now represented by a legislator who has been given 6 votes, and each legislator's vote is proportional to the population of his district, the legislators from districts A, B, & C who have only one vote apiece have no voting power whatever, since, with a total of three votes, they can never enact or defeat legislation over the opposition of the representative of District D, with six.

Under the multimember or modified weighted voting plans the result might be different. Since the six votes will no longer be cast, necessarily, as a block, the representatives of Districts A, B, & C may have an effective and meaningful vote in a situation in which the representatives of District D cast conflicting votes. Other situations may exist, under which the weighting of votes will be entirely ineffective. For instance in the case of five districts, four of which have 300 residents and one of which has 100, it will make no differ-

ence whether each district has a representative with one vote, or whether four have representatives with 3 votes apiece, and the one hundred resident district is given a representative with 1 vote. In either case, each representative has equal voting power, since the vote of three representatives will be required to make a majority. The same result will follow in all similar situations. There are many other hypothetical situations, and undoubtedly some exist, which also demonstrate that the actual voting power of a legislator is not necessarily equivalent to the number of votes which he casts in the legislative body. The argument has merit, therefore, that the voting power of a legislator, and consequently the effective legislative representation of his constituents should be measured not by the number of votes which he casts, but by the number of times, in all possible voting combinations, that the legislator can cast an effective vote, that is, the number of times when the votes of all other members of the body may be so evenly divided that he can change the result of the vote, on a pending measure by changing his vote from aye to no, or from no to aye. Weighted voting plans should not be condemned, however, because weighted voting may produce inequitable results under some circumstances. Weighted voting will, or will not produce effective legislative influence, proportional to population according to the circumstances which may exist, in any given case, and the plan provided by the local law, if otherwise acceptable would, in the instant case, produce that result. Mathematical computations, as shown by Table II, which is reproduced at the end of this opinion, demonstrate that, under the plan each legislator would have not only a weighted vote, but also an effective vote

which would be proportional to the number of his constituents. It may be seen from the table on which Column B represents the number of weighted votes cast by each legislator, Column C, the number of effective votes which may be cast by each legislator, Column D the proportion of the total weighted vote cast by each legislator, and Column E the proportion of the total effective vote which each legislator may cast, that a legislator from the Town of Greenburgh casts 2.439% of the total weighted vote, and may cast 2.447% of the total effective vote. Similarly a legislator from Eastchester, White Plains or Yonkers casts 1.974% of the total weighted vote, and may cast 1.974% of the total effective vote, and a voter from Pound Ridge casts .348% of the total weighted vote, and may cast .346% of the total effective vote. The weighted votes, and the effective votes cast by all other legislators, are similarly proportionate. None of these calculations which disclose only slight disparities appear to indicate any invidious discrimination in so far as legislative influence, and effective representation are concerned, and it is only the invidious discrimination which is prohibited by the equal protection clauses with which we are here concerned. (cf. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489, *Reynolds* v. *Sims*, 377 U. S. 533, and companion cases).

It is nevertheless contended that there still exists an invidious discrimination against the residents of the smaller districts, in terms of effective citizen influence on legislative determinations. It is argued, that although as between districts of unequal population, each having a single representative, the citizen of the smaller district has greater voting power, and casts a

more effective vote than the citizen of the larger district, the voting power of the citizen in either district is not proportional to the population of his district, but is inversely proportional to the square root of the population. The difference in voting power of the citizens of two districts of unequal population may be demonstrated mathematically by measuring the voting power of the citizen in each district by the number of times, in all possible voting combinations in his district, that he can cast a critical vote, and comparing the voting power of the citizens of the two districts as so determined. Thus, in the case of the four districts, A, B, & C having 400 residents each and D having 2500, the voting power of the resident of A, B, or C so measured is not 6¼ times as great as that of the resident of District D, but is 5/2, or 2½ times as great. Consequently the resident of District D does not need 6 legislative votes, or 6 legislators to equalize his voting power, and if he has been given that relief, he has been overcompensated, and his voting power and his effective legislative representation as compared with the voting power and representation of the voter in the smaller districts have been overweighted accordingly. It is asserted that this overweighting of the citizen's voting power, and legislative representation is just as apparent in the multimember districts as it is in the single member districts in which the single representative has an overweighted vote, since each legislator will vote in accordance with the wishes of a majority of his constituents, and if the multimember representatives could poll their constituents, all would vote alike, in accordance with the wishes of even a minimal majority, on each issue.

Under this analysis, the citizen's voting power is

overweighted, to the extent that his representative is given votes, or his electoral district is given representatives, in excess of the number which would have been assigned, if votes or legislative seats had been distributed in proportion to district population square roots. Nevertheless it is obvious, and conceded that under any plan which employs electoral districts of substantially unequal populations, effective population based legislative representation cannot be obtained by distributing legislative seats, or votes in proportion to population square roots. Whatever this may accomplish in giving a legislator voting power commensurate with that of the citizen, in his district, it will not give him a legislative influence, proportional to the population of the district which he represents. For instance, in the situation heretofore considered with districts A, B & C having populations of 400 each and district D a population of 2500, whether votes or legislative seats are to be distributed, 2, 2, 2 and 5, the results will be the same. In either case the three small districts with a total population of 1200 will be able to outvote District D with a population of 2500, and control, by minority rule, the deliberations of a legislative body consisting of the four representatives.

Table III, introduced by the opponents of the local law, and reproduced at the end of this opinion, is an analysis, supported by the testimony of qualified witnesses of the overrepresentation from the standpoint of citizen influence, of the various electoral districts, as compared with the least populous district, with 3 votes. Concededly, as has been stated, and as the table indicates this overrepresentation cannot be remedied by the allocation of votes or legislators on a square root basis. The analysis is concededly theoretical, since it assumes that the legislators will react to

an imaginary poll of their constituents, in voting in the legislative body, and does not take into account many practical considerations which might affect legislative votes. However it does indicate a potential influence which is not proportional to the citizen's effective voting power in his electoral district, which is inherent in systems employing electoral districts of substantially unequal population, and which cannot be remedied, unless all county legislators are to run at large in the County, by any apportionment plan except one which employs only districts of equal population.

If the 1964 "one person, one vote" determinations of the United States Supreme Court mean precisely that, and the dominant right which is required to be protected is equality of voting power at the citizen level, as many of the broad statements in the opinions in those cases appear to indicate, nothing remains to be done except to direct the Board of Supervisors to subdivide the County into districts of equal population, and apportion the legislative seats accordingly, even though the difficulties in effecting such a plan are apparent. However, perhaps because none has been asked to do so, no court of controlling authority has so far struck down a reapportionment law because of the potential discrimination disclosed by the calculations made by the witnesses who testified, and illustrated by the table above referred to, or even because of the disparities in effective influence, which may result from weighted voting proportional to population. The Supreme Court of the United States has approved the concept of multimember districting in a number of cases, and our Court of Appeals has approved it in at least one, although it does not ap-

pear that the argument here advanced was presented in any of them (See *Fortson* v. *Dorsey*, 379 U. S. 433, *Burnette* v. *Davis*, 382 U. S. 42, *Harrison* v. *Schaefer*, 383 U. S. 269, *Crawford Co. Bar Assn.* v. *Faubus*, 383 U. S. 271, *Burns* v. *Richardson*, 384 U. S. 73, *Michl* v. *Shanklin*, 50 Misc. 2d 460, aff'd 25 A.D. 2d 925, modified and affirmed 17 N.Y. 2d 906).

The Supreme Court did state, however, in *Fortson* v. *Dorsey*, (supra p. 438), where the argument was advanced that a resident of one of seven subdistricts in Fulton County, (a large multimember district, in which the subdistricts were designated only as the basis of residence requirements) was discriminated against, because he had to join with residents of the other districts to elect a senator, whereas the residents of a single member district of one seventh the population of Fulton County did not; "If the weight of the vote of any voter in a Fulton County District, when he votes for seven senators to represent him in the Georgia Senate, is not the exact equivalent of that of a resident in a single member constituency, we cannot say that his vote is not approximately equal in weight to that of any other citizen in the State."

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The prohibition of the equal protection clauses goes no further than the invidious discrimination (cf. *Williamson* v. *Lee Optical Co.*, supra, 348 U.S. 483, 489), and a legislative apportionment plan which seeks to preserve a separate voice in legislative processes, to the small, as well as the large communities if it can be effected without such discrimination, neither violates that prohibition, nor is it because of that purpose, irrational or unreasonable. If such a purpose can be effected, only through the employment of

weighted voting or multimember districting a plan which employs either device, or both should not be declared unconstitutional under the equal protection clauses because of defects which may appear in hypothetical situations not shown to be relevant, or because of inherent defects, which do not produce, in the particular case under consideration a constitutionally impermissible result. If it had been shown here that the asserted overweighting of the citizen's vote, in the more populous constituencies, had resulted in a distortion of the legislative influence of their representatives, to the detriment of their neighbors in the less populous constituencies, disapproval of the law on that ground would have been required. In that respect, however, the local law effects no invidious discrimination. Each legislator will cast an effective vote in the board, proportionate to the population of his constituency and proportionately equal on a population basis to that of every other legislator and no citizen will be denied full and effective population based representation through his elected representative or representatives. In the absence of controlling authority to the contrary, this court would not be inclined to require anything more, if the local law were otherwise acceptable.

Of course as has been stated if recent decisions of the Supreme Court and our Court of Appeals are to be interpreted as requiring nothing less than the election of equal numbers of representatives with equal voting powers, from districts of equal population to meet constitutional requirements, the local law must be disapproved in any event. There has been no indication so far however, of such a requirement, at the county level, at least. Neither has there been any determina-

tion in the multimember district cases which have reached the Supreme Court, or in the Graham case (supra) that the equal protection clauses require the assignment of all the representatives of a multimember district to a legislative committee in which the district is represented, or that a legislator who casts a weighted vote in a legislative body must be permitted to cast a vote of the same weight in committee work. If there is such a constitutional requirement, the local law is vulnerable from that standpoint, also. It is obviously not practicable to comply with such a requirement in the selection of committeemen, or in the actual work of the committees of the board, and apparently no party to this action contends that it is. However, although all matters which come before the Board of Supervisors are referred to committees for consideration and report, no proof has been produced that legislative determinations are made in committee, or are governed by the majority reports of such committees, or that any difficulty exists in bringing a measure out of committee for full discussion and action by the entire legislative body. In the absence of evidence to the contrary, it appears to be a reasonable conclusion that the weight of a legislator's vote will be given adequate consideration in committee work, and that if it is not he will make it felt when the committee report is submitted to the board for action. It appears to be a reasonable conclusion also that in other activities, such as debating on the floor, consultation with other branches of the government, and the like, adequate consideration will also be given to the legislator's potential influence on legislative decisions. All legislators cannot serve on all committees, and the work of some will involve more important matters than the

work of others. No matter what the plan of legislative apportionment may be, no citizen can be assured that his representative will serve on one committee, or another, or as a practical matter that his voting power in committee will be proportionate to his voting power in the legislative body as a whole. Nevertheless, the argument that the local law is invalid because the apportionment of voting power which it provides is unfitted for the work of legislative committees, is not unreasonable, or entirely lacking in merit. The question is not free from doubt, but in the absence of evidence which has not been produced, in this case, and of controlling authority it is the court's opinion that the local law should not be disapproved, because it does not provide for population based representation of the citizens of the county in legislative committees, or in activities of the legislators other than the discharge of their duties at the meetings of the board.

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